

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN DEAN ALLEN,

Defendant and Appellant.

B271532

(Los Angeles County  
Super. Ct. No. SA017792)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Jonathan B. Steiner and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

In 1995, a jury convicted defendant and appellant Kevin Dean Allen (defendant) of possession of a firearm by a felon. (Former Pen. Code, § 12021, subd. (a)(1), renumbered as Pen. Code, § 29800, subd. (a)(1).)<sup>1</sup> Having sustained two prior convictions for a serious or violent felony, the trial court sentenced defendant to 25 years to life pursuant to the Three Strikes law. Years later, defendant petitioned for recall of this sentence under section 1170.126, which was enacted in 2012 as part of Proposition 36, the Three Strikes Reform Act. The trial court denied defendant’s petition, finding he was armed with a firearm during the commission of the felon in possession of a firearm offense and thus statutorily ineligible for relief under Proposition 36. We consider whether the trial court’s ruling is correct.

## I. BACKGROUND

At defendant’s 1995 trial, a witness testified she heard gunshots outside her home. The witness looked out her bathroom window to the street below and saw a man, later identified as defendant, holding a gun and leaning on her husband’s car. The witness called 911, and Los Angeles County Sheriff’s Department Deputy Sean Ruiz (Ruiz) responded to the area of the witness’s home. When he arrived, Ruiz saw defendant leaning over the trunk of a car holding a gun, and Ruiz ordered him to drop it. Defendant failed to comply and ran away from Ruiz instead, throwing the gun “into some bushes” before he was ultimately apprehended.

## II. DISCUSSION

The sole issue on appeal is whether the trial court erred in finding defendant was ineligible for resentencing pursuant to section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii), which prohibit courts from granting a petition for recall of sentence where “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great

---

<sup>1</sup> Undesignated statutory references that follow are to the Penal Code.

bodily injury to another person.” Defendant argues the statutory reference to being “armed with a firearm” must “attach to the current offense as an addition and not just be an element of the current offense.” We reject this argument and instead follow numerous cases that have held a defendant convicted of being a felon in possession of a firearm is ineligible under section 1170.126 where the firearm was readily available for use in the commission of that offense.

“‘[A]rmed with a firearm’ has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. [Citations.]” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029.) “The California Supreme Court has explained that “[i]t is the availability—the ready access—of the weapon that constitutes arming.” [Citations.]” (*People v. White* (2014) 223 Cal.App.4th 512, 524.)

Testimony during defendant’s trial for the felon in possession offense that triggered the Three Strikes sentence establishes defendant was armed with a firearm and that it was available for use either offensively or defensively. Defendant was personally holding the firearm when seen by a civilian witness and Deputy Ruiz; he failed to drop the gun when ordered to do so; and he ran from Deputy Ruiz while still holding the gun, only later discarding it into some bushes.

Defendant nonetheless seeks reversal on the theory that one can only be armed “[d]uring the commission” (§ 667, subd. (e)(2)(C)(iii)) of the triggering offense if the arming facilitates the commission of some separate criminal offense. He acknowledges numerous cases have rejected the argument he advances. (See e.g., *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 [Proposition 36 requires a “temporal nexus between the arming and the underlying felony not a facilitative one”]; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048; *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1032-1035 [defendant disqualified from resentencing where firearm he was convicted of possessing was available for use either defensively or offensively].) Defendant makes no effort to distinguish these decisions; rather, he claims only that we should decline to follow them because they are wrongly decided. We are not persuaded.

DISPOSITION

The order denying defendant's section 1170.126 petition is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

KRIEGLER, J.